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In the

Supreme Court of the United States

October Term, 1932.

No. 393.

FEDERAL TRADE COMMISSION,
Petitioner,

vs.

ROYAL MILLING COMPANY, ET ALS.,
Respondents.

BRIEF FOR RESPONDENTS.

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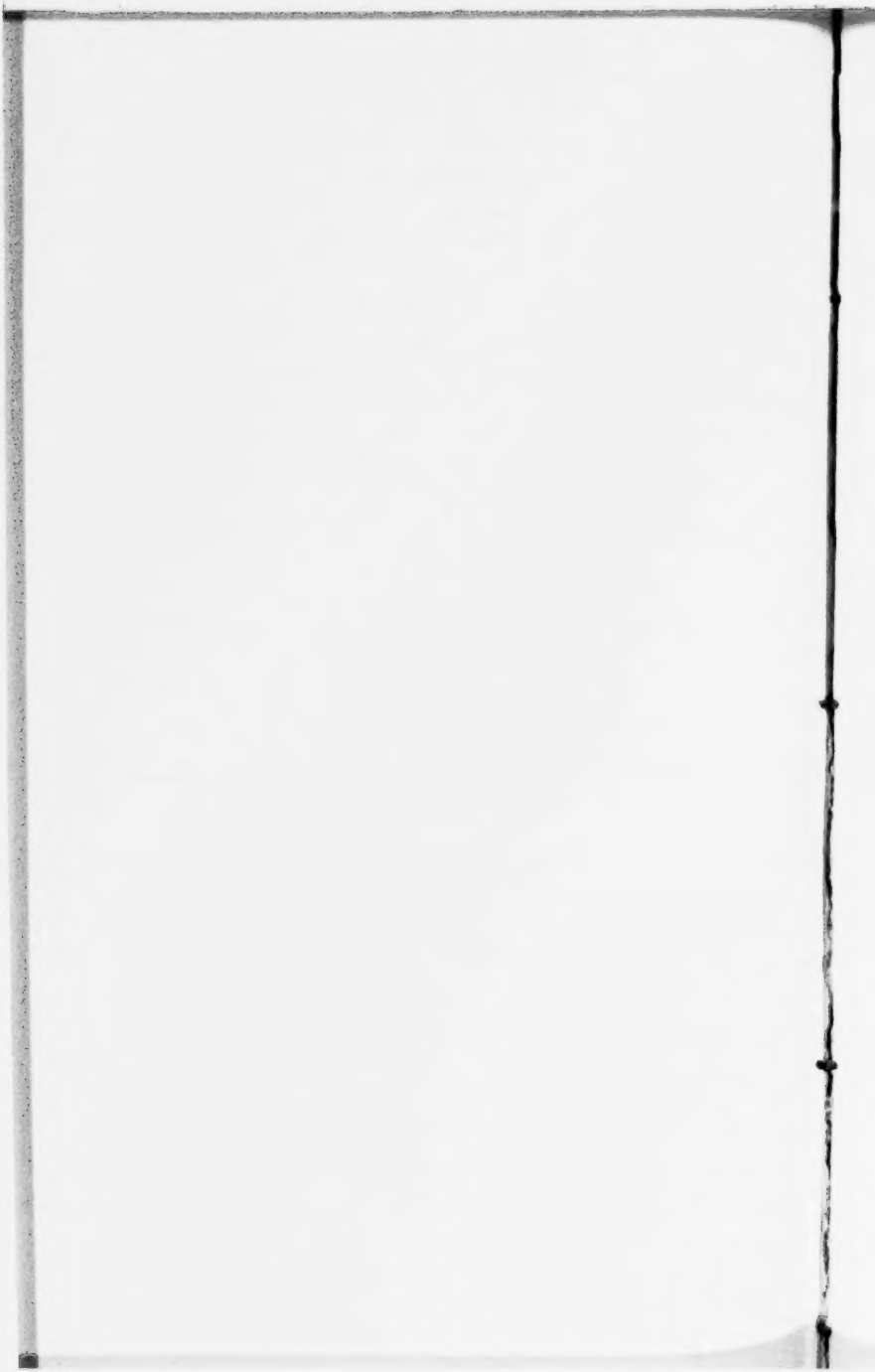

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BRIEF FOR RESPONDENTS.

I.

STATEMENT.

May It Please the Court:

In the original brief, opposing the granting of the writ of *certiorari*, a full statement of the case, from the standpoint of respondents, was made, and in the interest of brevity we shall ask leave to make reference to this.

Background of the Case.

It is conceived that every case arising under the Federal Trade Commission Act is, to a considerable extent, if not primarily, a problem in economics. The practical, rather than the theoretical, side is to be considered.

In the words of this Court:

> "The paramount aim of the Act is the protection of the public from the evils likely to result from the destruction of competition or the restriction of it in a substantial degree. . . ."
>
> *Fed. Trade Commission* v. *Raladam Co.* (1931), 283 U. S., 643, 647-648.

It will not be denied that the present record shows *the keenest form of competition* between the grinding millers, on the one side, and the Nashville manufacturers on the other.

The Court below found that:

> "The petitioners' product, and that of the grinding mills, are in active competition in the territory." (Rec., Vol. II, p. 190.)

And further:

> "There is here manifestly no threat to competition. Such effect as the Commission's orders may have upon the active competition that now exists will be in the direction of stifling rather than of preserving it." (Rec., Vol. II, p. 191.)

The witness *Vernon S. Tupper*, General Manager of respondent Nashville Roller Mills, testified:

> "The competition is about the hardest imaginable." (Rec., Vol. I, p. 673), and again, that it is "very keen, almost vicious." (Rec., Vol. I, p. 679.)

On cross-examination of this witness it was developed that his net profit for 1929 on 315,596 barrels of flour and a gross business of $2,170,036.01 was approximately $30,000.00, or "less than ten cents a barrel"—leading to the following colloquy:

> "MR. BANE: A very close profit.
> "A. Very close.
>
> "MR. BANE: And very close selling.
> "A. So close as to make it always uncomfortable to do any business." (Rec., Vol. I, p. 683.)

It seems, therefore, apparent, that there is no restriction of competition in any substantial degree under the present status, and it is further submitted that under such circumstances the Court below very properly refused to disturb the existing conditions.

It is further conceived that the facts leading up to the existing situation shed light on the present controversy, and may be of interest to the Court.

The early history of the contest between the grinding millers and the Nashville manufacturers is fully stated in the case of *Nashville Flour Transit Rules* (October, 1916), which is referred to in the Commission's last brief under the title *Freight Bureau* v. *Southern Railway Co.*, and which is reported in 41 I. C. C., 483.

This opinion was offered in evidence as an exhibit, but was withdrawn on the statement of counsel for the Commission that: "The Commission will take judicial notice of the decision" (Rec., Vol. I, p. 62). Afterwards, certain excerpts were read into the record (Rec., Vol. I, pp. 667-669). The Commission's witness McCarthy took an active part in that proceeding (Rec., Vol. I, p. 62), and so did the respondents' witness Tupper (Vol. I, p. 669), and these two witnesses were examined with regard thereto.

(Rec., Vol. I, pp. 59-63, pp. 667-672, pp. 694-697.)

While the statements of fact made by the Interstate Commerce Commission may not be evidence in the technical sense, we think they will not be questioned as being historically accurate. The record, in connection with this opinion, shows the facts now to be stated.

In 1898, and prior thereto, the situation in the section known as the "Southeastern territory" was this:

There were and are comparatively few grinding mills in the South—"the South is a consuming section, has no flour mills. . . ." (Rec., Vol. I, p. 85.)

The grinding mills sold flour in carload lots to the jobbers (Rec., Vol. I, p. 48, 41 I. C. C., p. 487), who in turn sold to the retailers.

The jobbers also sold salt and baking powder to the retailers (41 I. C. C., pp. 485-486).

Thus the jobbers made a profit on all these commodities, and so did the retailers, at the expense of the consuming public.

In 1898, the Ford Flour Company of Nashville began in a very small way (3-5 barrels daily output) the manufacture of "self-rising flour"—that is to say flour properly mixed with the leavening ingredients (Rec., Vol. I, p. 108, 41 I. C. C., p. 485).

This new business gradually increased in size, but from the outset encountered strong opposition—(a) from the grinding mills, (b) from the jobbers, and (c) from the retailers (41 I. C. C., pp. 485-486, Rec., Vol. I, p. 108, p. 109).

The reason, of course, was because this new commodity interfered with the profits which they were exacting from the public on flour, baking powder, and salt.

The claim was made by the grinding millers' salesmen that self-rising flour contained poisonous chemicals (41 I. C. C., p. 485), and even today there are people in Nashville who believe this. (Rec., Vol. I, p. 109.)

About 1908, the Nashville railroads granted a "milling in transit privilege" on self-rising flour (41 I. C. C., p. 486) —that is to say flour brought in, and manufactured into self-rising flour, could be shipped on the through rate, in less than carload lots to the Southeastern territory. (41 I. C. C., p. 487.)

In this way the Nashville producers (several plants had by this time been established) could make "drop shipments" to the small retailer who could buy only 2-5 barrels at a time (Rec., Vol. I, p. 85).

In addition to the saving on freight, which lowered the price to the consumers (Rec., Vol. I, p. 671, p. 85), there was a distinct saving—estimated by one witness as being from 40 cents to $2.15 per barrel (Rec., Vol. I, p. 82), and by

another as being from 80 cents to $4.00 per barrel (Rec., Vol. I, p. 678)—according to the quality of the baking powder and salt which the particular housewife might use. This saving is, of course, produced by the fact that the leavening ingredients are bought in carload lots (Rec., Vol. I, p. 678).

Self-rising flour, scientifically mixed, is also a better food article. (Rec., Vol. I, p. 680, p. 82.)

The grinding millers, who had been vigorously fighting the product, were thus compelled, by its increasing popularity, *to install the necessary machinery and begin the manufacture of self-rising flour* (41 I. C. C., p. 486), and practically all mills selling in this territory are so equipped (Vol. I, p. 157). They are thus merely *the imitators and followers* in this field.

After an interval of keen competition (41 I. C. C., p. 496), the grinding mills, in October, 1916, attempted to induce the railroads to withdraw the "milling in transit" privilege from the Nashville producers, whose number had greatly increased.

This was in the case already cited (Nashville Flour Transit Rules, 41 I. C. C., 483), wherein the Southeastern Millers' Association intervened (Rec., Vol. I, pp. 61-62, pp. 670-671, 41 I. C. C., p. 488), and the proceeding thereafter resolved itself into a fight between these two competing interests (41 I. C. C., p. 487).

Evidence was introduced by both sides as to whether the process used by the Nashville producers was "milling" (Rec., Vol. I, p. 669).

The Interstate Commerce Commission, while stating that the question was "*admittedly a close one, open to honest differences of opinion*" (41 I. C. C., p. 497), found it unnecessary to decide the point—holding, however, that the process of manufacture was *essentially the same in each case*, and that the railroads could not grant the privilege to the grinding mills, while withholding it from the Nashville producers (41 I. C. C., p. 497).

The Nashville manufacturers, after this decision, felt that certainly as to this commodity they had the right to call themselves "mills."

McCarthy (Commission's witness) says:

> "I use the words 'Mills' or 'Milling' in these various trade names for the reason that I consider the manufacture of self-rising flour is a milling process; also the manufacture of process(ed) flour. *This belief is strengthened by the fact that the Interstate Commerce Commission granted us the same milling in transit privileges or rates on self-rising and blended flours as to the mills.*"
>
> (Rec., Vol. I, p. 59; and see also p. 55, p. 62, for similar statements.)

Nobody, so far as the record shows, questioned their right to call themselves "mills" until the present proceeding was begun some twelve years afterward, in 1928.

The learned Federal Trade Commission (as we submit) has remained silent on the question as to whether the Southeastern Millers' Association instigated the present proceeding—failing or refusing to file an answer to the complaints, in which the charge was made (Rec., Vol. II, p. 197, p. 194), despite the fact that it had established in the Court below the precedent of filing not only an answer but a cross-bill when so advised (*Raladam Co.* v. *Federal Trade Commission* (1930), 42 Fed. (2d), 430, 432).

But the inference seems reasonably clear that the Southeastern Millers' Association was the actor, and that this proceeding is merely another step in the thirty years' war between the contending factions.

The record therefore discloses (as we submit) that the tactics thus far employed by the grinding mills are as follows:

1. Campaign of misrepresentation.
2. Attempt to take away milling in transit privilege.
3. Attempt to take away trade names, and discredit respondents.

The effect of sustaining this last attempt, it is respectfully submitted, would be:

First. To put the respondents to a very considerable expense in changing their bags, etc., besides destroying the value of their trade names, and good will (Rec., Vol. I, p. 76, p. 682, p. 23).

Second. To afford a "talking point" to the salesmen of the grinding mills, viz, the claim that respondents (as stated by one witness in another connection) "have been found guilty by a branch of the Federal Government, that they are nothing but ordinary common blenders and pack cheap flour." (Rec., Vol. I, p. 90.)

Third. To disable or weaken respondents (and others in the same business), as competitors; and

Fourth. To disturb the existing balance in the keen competition which now prevails.

The public (we submit) cannot possibly be interested, except in the continuance of this keen competition.

The record, therefore, presents merely a "private controversy"; and this defense was advanced by respondents in their answers to the original and amended complaints, filed respectively on May 20, 1929, and October 3, 1929, (Rec., Vol. I, p. 6, p. 9, p. 17, p. 21)—even before the Court delivered the opinion in the *Klesner* case, which was filed on October 14, 1929. (280 U. S., p. 19.)

The Commission did not notice the point.

II.

SUMMARY OF ARGUMENT.

Respondents submit the following contentions:

1. That petitioner in its last brief attempts to recede from the case on which the writ was granted:

(a) Because its petition and supporting brief dealt only with the requisite of "public interest," and approached this question from the standpoint of the ultimate consumer's right to buy whatever he chose.

Whereas, the last brief attempts to advance the further theory that public interest depends on fair competition, and that a substantial diversion of trade through misrepresentations—where no particular dealer is sufficiently injured to sue—satisfies the requisite of "public interest," and gives the Commission jurisdiction.

No such question was considered below, or raised in the petition.

(b) Because the last brief submitted deals largely with two other requisites which are necessary to support a proceeding under Section 5, viz, that the method is "unfair," and that it is a method of "competition."

The purpose of this is not apparent.

2. That the original theory as to "public interest," advanced in the petition and supporting brief, is unsound:

(a) Because it assumes that ultimate consumers have a preference as between the products of a grinding mill and the products of these respondents.

There is neither pleading nor proof to support this theory.

(b) Because (considered as an abstract proposition) it is not in line with the opinions of this Court, nor with the best considered opinions of the lower Federal Courts.

3. That the new theory of "public interest"—based on the so-called "dictum" or "illustration" in the *Klesner* case—is untenable, even if petitioner may now urge it:

(a) Because that illustration must be read in the light of the whole opinion, whose essential predicate is, that a proceeding under Section 5 must be for the purpose of protecting the public—not the dealer—and the public interest must be specific and substantial; and because the illustration should be harmonized with the opinion in the *Raladam Co.* case.

(b) Because the record does not present the case assumed by the Court in the illustration.

4. Assuming that the two new contentions as to "unfair methods" and "methods of competition" have any place in this dicussion, they are unsound:

(a) Because the theory of the Commission that many dealers have a real preference as between the products of respondents and those of a grinding mill is not supported by substantial evidence, nor is it true that dealers generally in this territory, or any substantial portion of them, have been deceived by the use of the words "Mills" or "Milling" in respondents' names.

(b) Because the claim that trade has been thus diverted, and that legitimate competitors have been thereby injured, is not supported by substantial evidence.

(c) Because the theory that the grinding millers are in any danger from this alleged diversion, is unsupported by any substantial evidence.

5. That even if the findings of the Commission be conceded, the order is inequitable and erroneous:

(a) Because it ignores the offer of respondents to use qualifying words which would prevent the possibility of misunderstanding.

(b) Because it prohibits the respondents from stating that they are "manufacturers" of "self-rising" flour, while permitting the grinding millers (who use exactly the same

process) to make this statement; and because there is no finding to support this part of the order.

(c) Because it inflicts unnecessary hardship on respondents in directing the discontinuance of their trade names, thus putting them to heavy expense and destroying the value of the good will which has been allowed to grow up over a long series of years.

III.

ARGUMENT.

(A)

DEPARTURE FROM THE CASE ON WHICH THE WRIT WAS GRANTED.

In our original Brief (pp. 10-13) attention was called to the variance between the Commission's position as set out in the "Complaints," and the position taken in the petition for certiorari.

An even more serious and substantial variance appears between the petition and supporting brief, on which the writ was granted, and the brief now filed for use in the argument here.

Theory in Petition and Supporting Brief.

The petition, in stating why this Court should grant certiorari, says (p. 7):

> "1. The case presents *a question* of public importance which has not been but should be decided by this Court. The Circuit Court of Appeals, holding that the proceeding was *not in the public interest*, seems to have based its conclusion that the Federal Trade Commission was without authority . . . solely upon the failure of the Commission to find that *respondents' product was inferior to or different from* that of their competitors." (Italics added.)

In the supporting brief, it is said:

"Question Presented."

> "Whether the findings of fact and conclusions of the Federal Trade Commission in this case were sufficient to support its cease and desist orders *without allegation, proof, or finding that respondents' product was injurious to the public or inferior to or different from*

the products sold by its competitors." (Italics added.) (Supporting Brief, p. 10.)

The case is thus reduced to a single issue—whether the requisite of "public interest" exists, when the consumer is led to purchase some article which he did not intend to purchase, even though the article is not inferior, etc.

The whole approach is from the standpoint of the right of the *ultimate consumer* to purchase what he desires, and certain authorities along this line are cited (pp. 12-14).

Federal Trade Commission v. *Klesner* was not relied on as an authority for the petitioner. On the contrary, an attempt was made to distinguish it. (Supporting Brief, p. 16.)

Contention in Last Brief.

But the last Brief filed gets away from this, and takes the position *that public interest depends on fair competition,* and that wherever there is a substantial diversion of trade, by reason of misrepresentations,—although "no particular trader is legally entitled, or sufficiently injured, to obtain redress,"—the element of public interest is present, and the Commission has jurisdiction.

(See Commission's last Brief, p. 21.)

This is to approach the question from the standpoint of the *dealer,* and is frankly predicated upon what the petitioner terms "the dictum of *Federal Trade Commission* v. *Klesner,* 280 U. S., 19, that an unfair practice which is serious and widespread may be a matter of public concern where no private suit to stop it could be brought." (Last Brief, pp. 10-11.)

This is the first mention of the aforesaid "dictum."

No reason is given for this change of position. It may, however, be surmised that the respondents' Brief in opposition—which showed (pp. 13-20) that the Commission's finding as to an alleged preference on the part of consumers was wholly unsupported—was at least a factor.

New Elements of "Unfairness" and "Competition" Introduuced.

In the last Brief under the head of "Questions Presented," it is said:

> "The *principal* question presented is whether, in a proceeding under Section 5 of the Federal Trade Commission Act, the Commission must find that the respondents' product is injurious to the consumer or inferior to that of competitors, in order that its cease and desist order may be in the 'public interest.' A question *also* is presented *whether the Commission's findings that the respondents diverted trade from competitors by falsely representing that they are milling companies and manufacturers of flour is supported by evidence.*" (Italics added.) (Last Brief, p. 2.)

It is, of course, settled that to support a proceeding under Section 5, three requisites must be present:

(a) The methods attacked must be "unfair."
(b) They must be methods of "competition."
(c) The proceeding must be in "the public interest."
Federal Trade Commission v. *Raladam Co.*, 283 U. S., 643, 646-647.

The original petition, as we have shown (*Ante*, p. 11) asked this Court to grant certiorari on a question arising solely under the third requisite above noted.

Why is it now sought to bring in the other two requisites?

We submit that after obtaining a writ of certiorari on a single well-defined issue, the petitioner cannot present a substantially different case, or new questions, on the argument.

Erie R. R. v. *Kirkendall* (1924), 26€ U. S., 185.

(B)

THE THEORY AS TO "PUBLIC INTEREST" ADVANCED IN THE PETITION AND ORIGINAL BRIEF IS UNSOUND.

This contention has been quite fully presented in our original Brief in opposition (pp. 13-28), to which we ask leave to refer.

Without repeating all this, it is respectfully submitted:

1. That the complaints in this proceeding advanced the theory that the consumer was "injured" because a substantial part of the consuming public thought they could get a *better price* from the wheat grinding mill, by the elimination of the middle man's profit. (Rec., Vol. I, p. 15, Respondents' Original Brief, p. 11.)

The theory of public interest stated in the complaints, was therefore a mere extension of the doctrine in *Federal Trade Commission* v. *Pure Silk Hosiery Mills* (C. C. A., 7, 1925), 3 Fed. (2d), 105, and in a line of the Commission's own decisions, where it is held unfair competition for a merchant having no plant or machinery to advertise himself as a "mill," or a "manufacturer," and deceive the public by claiming that he eliminates the middle man's profit and can *make a better price.* (See, for example, *In re New York Twine Mills*, 9 Federal Trade Commission, Dec. 33, *Re Furniture Manufacture Show Rooms*, 9 Federal Trade Commission, Dec. 349.)

This was obviously a very different theory from the present claim that the consumer is "injured" *because there is an interference with his right of choice.*

The present contention is, therefore, unsupported by pleading.

2. There is no proof at all (as we read the record) to support the Commission's finding that "many" consumers prefer to buy flour that comes directly from a concern that ground the wheat into flour rather than one that bought the flour from a grinding concern, mixed it and packed it and then resold it," etc. (Rec., Vol. I, pp. 32-33.)

In our original Brief (pp. 14-20) a full review of the evidence on this point was attempted, which (as we submit) fully sustains this contention.

It was there shown, from the testimony of dealers from all parts of the territory, that consumers have no interest whatever in the maker or manufacturer of flour, but buy almost exclusively *by brand*, just as they buy soap, coffee, and other standard articles.

The testimony of consumers was likewise reviewed (pp. 19-20), with the same result.

Right to Attack Finding.

The Court will perceive that the Commission's finding is attacked, not to put the lower Court in error, but to sustain its decree. This, we understand, is permissible, when the case is here on certiorari, without the necessity for cross-petition.

Story Parchment Co. v. *Paterson Co.* (1931), 282 U. S., 555, 560.

Langnes v. *Green* (1931), 282 U. S., 531, 535-539.

3. It is further submitted that the Commission's original theory of public interest, as presented in the petition, and as amplified in the last Brief, is unsupported by authority. (Original Brief of Respondents, pp. 21-28.)

This theory goes beyond the *Ohio Leather Co. case* (C. C. A., 6, 1930), 45 Fed. (2d), 39, on which petitioner relies. For in that case, the Court merely observed that if purchasers had a real preference—which the Court doubted (See 45 Fed. (2d), p. 41, p. 42, note 6)—as between goat-skin shoes and calf-skin shoes, they were entitled to get what they wanted, even though the other might be "just as good."

If the respondents made their self-rising flour from some other cereal than wheat, or with some other leavening ingredients than salt and baking powder, there would be an analogy between the two cases. But here the two articles are precisely the same, made in precisely the same way.

No difference in quality was alleged in the complaints, or set out in the findings, for the evident reason *that no difference existed.*

We are persuaded that the *Klesner case* stands squarely in the way of petitioner's contention. Sammons and Klesner (it would appear) sold precisely the same article. Klesner's shades were not inferior (280 U. S., p. 28), and the mere fact that customers *wished to buy from Sammons,* and were misled by false representation into buying from Klesner, was *not* sufficient to show "public interest."

It will be remembered that the Court said:

> "This use by Hooper & Klesner of the term 'Shade Shop' has caused, and is causing, 'confusion to the window-shade purchasing public throughout the District'; and on certain occasions, customers who entered Hooper & Klesner's shop were deceived by employees, being led to believe that it was Sammons'." (280 U. S., p. 24.)

We submit that this goes beyond anything shown in the present case.

Nor do we believe that the Klesner case turned on the fact that only two individuals were involved. If the case is to be confined to its own facts, it will cease to be an authority—for it may be safely predicted that the Federal Trade Commission will never bring another suit where only two competitors are concerned. Moreover, such a view overlooks the fact that the "window-shade purchasing public" was involved; and no difference is apparent between the public in the District of Columbia and the public in the Southeastern territory.

In the *Winsted Hosiery Company* case (258 U. S., 453), there was a deceptive substitution of an inferior article for a superior article—obviously to the financial injury and exploitation of the public.

In the *Raladam Company* case there was danger of actual physical injury to the public.

In the *Ohio Leather Company* case (*Ante*, p. 15)—if it is to be considered an authority—calf-skin was substituted for kid-skin. It seems, however, plain, that the lower Court takes no stock in petitioner's present theory. This was shown, not only by its opinion in the present case, but by its previous pronouncements in *L. B. Silver* v. *Federal Trade Commission*, 289 Fed., 985, 989, and *Berkey & Gay Furniture Co.* v. *Federal Trade Commission*, 42 Fed. (2d), 427, 430. (See Respondents' original Brief, pp. 25-26 for review of these cases.)

So in *Indiana Quartered Oak Co.* v. *Federal Trade Commission* (C. C. A., 2nd, 1928), 26 Fed. (2d), 340, the dealer had been selling as "Philippine Mahogany" or "Mahogany"

certain hardwoods imported from the Philippine Islands, which belonged to the lauan or tanguile family, and not to the genuine Mahogany family. But the evidence showed in that case "that many of the characteristics and virtues possessed by Mahogany are lacking in Philippine hardwood" —for example, that it was too soft for flooring, that it could not take the required finish for lamps and pianos; that it did not retain the sub-surface lustre peculiar to Mahogany, and, unlike Mahogany, did not beautify with age. (26 Fed. (2d), p. 341.) To sell this for genuine Mahogany was like selling cotton for wool. The purchasing public was in fact "injuriously affected."

Federal Trade Commission v. *Balme* (1928), 23 Fed. (2d), 615, on which the petitioner relies, was based on that part of the Commissioner's order which dealt with the simulation of a container (p. 617), and seems to us to stress too much the rights of the dealer, the simulation of brands, the resulting confusion, etc.,—as if such a proceeding were only a suit in equity to restrain unfair competition. We are unable to reconcile this with the *Klesner case*, or with the *Raladam Co. case*. The Court seems to treat *Federal Trade Commission* v. *Winsted Hosiery Mills* as if it were merely a case of misbranding (23 Fed. (2d), p. 620).

We recognize that misbranding has been pointed out as an "unfair" method, (*Federal Trade Commission* v. *Raymond Bros.-Clark Co.* (1924), 263 U. S., 565, 566), but submit that this Court has never indicated that misbranding is in and of itself sufficient to supply the requisite of "public interest."

However this may be, there is here no case of misbranding, or simulation of competitors' bags and containers; and no such charge is made in the complaints, or in the petition for certiorari. Nor is there any such finding by the Commission, or any such proof.

As hereinbefore shown (*Ante*, p. 14), the public buys flour *by brands*, and there is no pretense that respondents have simulated any brands of the grinding mills.

Claim of Additional Burden.

As to the claim that an additional burden will be placed on the Commission to show inferior quality in all these cases, if the opinion below shall be sustained:

The burden has always been on the Commission to show a "public interest" which is "specific and substantial." (*Federal Trade Commission* v. *Klesner*, 280 U. S., at p. 29; *Federal Trade Commission* v. *Raladam Co.*, 283 U. S., at p. 649.)

Mere deception of purchasers is *not* sufficient—the purchaser must be "*injuriously* affected" (*Federal Trade Commission* v. *Klesner*, 280 U. S., p. 27, p. 28), as in the *Winsted Mills case*, or else the danger to competition must be such as to "injuriously affect the public."

(*International Shoe Co.* v. *Federal Trade Commission*, 280 U. S., p. 298.)

If the element of palming off an inferior product on the public (cotton for wool) is involved, the Commission should be required to allege and prove it.

If it is *not* involved,—if there is a mere deception without "injury"—(Klesner's window shades for Sammons' window shades)—then no public interest exists; unless, of course, it can be developed along the line of danger to competition.

All this, however, as we respectfully submit, cannot concern the instant case. For here there is not even the theoretical injury of interference with the customer's preference. No such preference exists. (*Ante*, p. 14.) And the petitioner's statement of the question at issue concedes that there is neither allegation, finding, or proof of inferiority. (*Ante*, p. 11.)

(C)

THEORY OF "PUBLIC INTEREST" BASED ON THE ILLUSTRATION USED IN THE KLESNER CASE HAS NO APPLICATION.

"Public interest" (we submit) can exist in only two cases:

1. Where purchasers are physically or financially injured.

2. Where unfair methods are practiced, which tend to establish a monopoly, with its resulting train of evils.

It may be true that since the decision in *Federal Trade Commission* v. *Raladam Co.* (1931), 283 U. S., 643, only the latter class exists.

This was apparently the belief of Judge Denison, who advanced the theory in his dissenting opinion in the *L. B. Silver Company case* that the Federal Trade Commission Act was never intended to reach methods of unfair competition, except such "as tend toward that monopoly or restraint of competition which the anti-trust acts prohibit."

L. B. Silver Co. v. *Federal Trade Commission* (C. C. A., 6th, 1923), 289 Fed., 985, 993.

It is hardly necessary to say that this idea formed the basis of his opinion in *Raladam Co.* v. *Fed. Trade Commission* (1930), 42 Fed. (2d), 430, 435-437.

In any event, the petitioners' new theory must fall within the second class—for it does not attempt to establish "public interest" through direct injury to the ultimate consumer.

If direct injury to the consumer is out of the way, the only other alternative is to show unfair methods which tend to break down competition, and thus produce monopoly.

It is submitted that the Court did not intend to say in the "illustration" on which the petitioner relies, that mere losses on the part of dealers, which were in each case too small to warrant a private suit, would show "public interest"—unless indeed the results in the aggregate were so serious and widespread *as to endanger the welfare of the public, because tending to establish an ultimate monopoly.*

By this reading, the statement is reconciled with the Court's opinion in *Federal Trade Commission* v. *Raladam Co.*

Of course the mere fact that *some* trade is diverted by the unfair practice is *not* sufficient to give jurisdiction—

for that occurs in every unfair competition case, as the *Klesner* case specifically recognizes. (280 U. S., p. 27.)

Sammons' trade was diverted by Klesner, in that very case (Id., p. 24).

It is the *widespread and serious* diversion, tending to destroy the business of competitors, which makes the difference.

If we are correct in this view, it seems quite apparent that the principle for which petitioner contends can have no bearing in this case.

For here, the record shows without contradiction:

1. That respondents have been using trade names with the words "Mills" or "Milling" for many years. Royal Milling Company was established in 1902 (Rec., Vol. I, p. 23); Nashville Roller Mills was established in 1908 (Rec., Vol. II, p. 60); Snell Milling Company was established in 1925 (Rec., Vol. II, p. 98); State Milling Company was established in 1912 (Rec., Vol. II. p. 137); Cherokee Mills was established in 1910 (Rec., Vol. II, p. 172).

2. There is no claim that the Nashville manufacturers are organized.

3. The grinding millers, on the other hand, have maintained a powerful trade organization (Southeastern Millers' Association), which was in existence at least as early as 1916 (41 I. C. C., p. 488).

4. The two factions were engaged in "very real and active competition" previous to 1916 (41 I. C. C., p. 496).

5. That competition, in its most active form, was in existence when the proof in these cases was taken. (Rec., Vol. II, p. 190, p. 191; Vol. I, p. 673, p. 679, p. 683, *Ante*, p. 2.)

The petitioner's argument, therefore, seems to ignore the actual situation, and indeed to approach the ludicrous —especially when it is considered that *all attempts to break*

down competition have been made by the grinding mills. (*Ante*, pp. 4-6.)

We submit that the Southeastern Millers' Association may be very safely trusted to take care of itself in the future as it has in the past—for all the power and wealth seem to be on that side. Petitioner is careful to point out that a 3,000-barrel grinding mill "costs about $600,000." (Last Brief, p. 5.)

(D)

THE CONTENTIONS AS TO UNFAIR METHODS AND DIVERSION OF TRADE ARE NOT SUPPORTED BY SUBSTANTIAL EVIDENCE.

Much of the petitioners' last brief seems to be devoted to these contentions, which as previously shown (*Ante*, p. 13), were not brought forward in the petition and supporting brief, as questions to be considered,—although certain facts along these lines were stated.

Assuming, for argument's sake, that they are pertinent to this discussion, it is submitted that they find no support in this record.

The Court has held that the purpose of the Federal Trade Commission Act is "the protection of the public from the evils likely to result from the destruction of competition or the restriction of it in a substantial degree" (*Fed. Trade Com.* v. *Raladam Co.*, 283 U. S., at pp. 647-648); and in reviewing the debates in Congress attendant upon the passage of the Act:

> "that by the words 'unfair methods' was meant those resorted to for the purpose of *destroying competition* or of *eliminating a competitor* or of *introducing monopoly* —such as tend unfairly to *destroy* or injure the business of a competitor; that the law was necessary to protect small business against *giant competitors;* that it was an effort to make competition stronger in its fight against monopoly; that unfair competition was that practice which *destroys competition* and *establishes monopoly.*" (Italics added.) (283 U. S., p. 650.)

The facts as to the existing status have just been reviewed (*Ante*, p. 20), and from this it is apparent that the keenest competition exists, and that the rights and interests of the consuming public are fully protected.

It seems a singular thing that the Federal Trade Commission, by theoretical arguments and refinements as to the meaning of "public interest," should seek to bring about a situation which will in fact impair or destroy the *actual* interest of the public as it now exists.

Literature.

We have never contended that respondents, in their circulars, etc., had the right to say that they were grinders of wheat, and admit that they have no such right.

Reference is made in the Commission's Findings (Rec., Vol. I, pp. 31-32, Vol. II, pp. 31-32, pp. 69-70, pp. 107-108, pp. 145-146, pp. 182-183), to literature, advertisements, etc., alleged to be put out by Respondents, as if the excerpts quoted were typical of each Respondent's advertising.

But when these are analyzed, it appears:

(a) That the only excerpts which might fairly be said to imply "wheat grinding" are attributable to a *single Respondent*, viz, State Milling Company (Rec., Vol. II, pp. 145-146).

This is frankly shown in the Petitioner's last Brief (p. 15).

The *dates* of these alleged statements are not shown in the Findings of the Commission. Nor is there anything to show that these statements were *habitually made* or were anything other than isolated cases. It does not even appear from the Findings that these statements were made by the present owners of the business, who only acquired it in 1924. (Stipulation, Rec., Vol. II, p. 137.) The original exhibits (which are not accessible) may, of course, fix this.

(b) As to the various statements to the effect that Respondents are *"manufacturers,"* it is insisted that they had the right to so style themselves—not manufacturers of wheat, but manufacturers of *self-rising and processed flour.*

As to these commodities, *they stand on exactly the same basis as their wheat-grinding competitors.*

The cases are, of course, *identical* where these competitors buy flour from others, put it through their batch-mixers, and put it out under their own brands, according to the widespread and well-established practice in this behalf. (See our Original Brief, p. 6.)

But the two operations are essentially the same where the grinding mill makes its own flour. The making of "self-rising" or "processed" flour is a *wholly separate process*, which is *exactly the same* in either case. (Original Brief, p. 5.)

If respondents are not manufacturers of *self-rising* flour, neither are their wheat-grinding competitors.

(c) The references to "wheat" are explained by the following stipulations:

> "That the *price of wheat*, as fixed by the St. Louis wheat market, is a factor *which enters into the price of flour* in the Southeastern territory, and is so regarded by operators of wheat-grinding mills as well as by operators of the plants for the making of 'self-rising' or 'processed' flour in Nashville, *and by wholesale and retail merchants* in said Southeastern territory" (Docket 1599, Stip., Par. III, Section 13, Rec., Vol. II, p. 62, which is applicable to all these cases as shown by Par. II of same Stipulation, Rec., Vol. II, p. 60).

Respondents' customers, buyers of self-rising and processed flour, are of course interested in the wheat market, for it directly affects the price of the commodity which they are buying.

(d) As to the references to daily output or capacity, and cutting out the middleman's profit, they are *true*. Each of the respondents has a plant and actual machinery for the manufacture of their products. And all of their business (except Nashville Roller Mills) *goes direct to the retailer.* (See Stipulations.)

"Deception" of Merchants and "Diversion of Trade" by Use of the Word "Mills."

It is submitted that no substantial part of the merchants in this territory are deceived by the use of the word "Mills" in Respondents' names, and for that reason became purchasers of their products, etc., although the Commission made findings to that effect. (See, for example, Rec., Vol. I, pp. 32-33.)

The Commission, in February, 1928, wrote letters, requesting from ten Nashville concerns dealing in "self-rising" flour, lists of twenty-five of their customers. These concerns included the seven original respondents, and three other individuals who used the word "Mills' 'in their trade names, but who had, in fact, no plant or machinery of any kind, and whose cases are not involved herein (Rec., Vol. I, pp. 663-664, Ex. 68; Vol. II, p. 24, pp. 62-63, p. 100, pp. 138-139, pp. 174-175).

Nine of said concerns so interrogated complied with the request (citations *supra*)—whereupon the Commission sent questionnaires to each of these 225 customers, asking their understanding of the word "Mill," whether they thought it to their advantage to buy from a grinding mill, etc. (See Rec., Vol. I, p. 140, pp. 143-144, p. 193, p. 209.) But for this purely voluntary action on the part of respondents, it would have been difficult, if not impossible, for the Commission to have circularized their customers.

Although 225 merchants were thus interrogated by the Commission, *only twenty-three witnesses of this class* were introduced in its behalf.

The record does not show how many answered the questionnaires, nor what they said, nor why only twenty-three were deemed available as witnesses by the Commission.

But the record does show that of these twenty-three selected witnesses, *six*, or more than one-fourth, testified that they were not "deceived," and knew from business experience, or otherwise, that the Nashville producers using the name "Mills" did *not* grind wheat.

Thus, in the examination of Commission's witness *Murphee*, the following occurred:

"EXAMINER SHEPPARD: If you see the word 'milling' or 'mill' on the outside of the container, would that indicate to you that the manufacturer was a grinder of grain?"

"A. Well, MR. EXAMINER, of course I *know now from experience*, I have been in business, that the blenders use the word 'mill,' therefore, really, unless I know, *it would not convey any meaning* to me at all." (Rec., p. 124.)

See also the following witnesses for the Commission:

Harrison ("I think it has been *generally known for several years* that the blenders call themselves millers"). (Rec., p. 135.)

Starks ("Well, it would indicate one who ground wheat into flour, but I do not understand it as such, because of my experience. *I understand it is one who grinds wheat into flour or mixes it, or blends it*"). (Rec., p. 204.)

Warner (Got the information through salesmen from the flour mills). (Rec., p. 209.)

Franklin ("I have found that it is *used generally by the blending plants* as well as the people that grind"). (Rec., p. 211.)

Taylor ("Well, from my experience, what I have learned, what I have heard, rather, for a number of years, there was *not but one wheat mill that manufactured wheat into flour in Nashville*, and maybe it was down a part of the time"). (Rec., p. 277.)

Seven others of the twenty-three testified that they *preferred* to buy flour from "blenders," or that they were *indifferent* as between "grinders" and "blenders."

Metcalf (Commission's witness):

"Q. Does the use of either of these words in the name of a concern selling flour convey or have any influence on you in making purchases of flour?

"A. *No, sir*" (Rec., p. 194).

Sewell (Commission's witness) (Rec., p. 146), prefers to buy from mixer "because I get better service and get just as good a product."

Adams (Commission's witness):

"Q. If the price is right, and the quality right and service right, those would determine you in buying?

"A. Sure." (Rec., p. 151.)

Grist (Commission's witness), "A man in the retail business will buy the flour he can get the trade to take the most of." (Rec., p. 207.)

Bought on price, quality and service. (Rec., p. 208.)

Wakefield (Commission's witness), price, quality of article and service guide, in purchase.

"Q. And those determine your purchase, always?

"A. Yes, sir." (Rec., p. 270.)

Suter (Commission's witness),

"Since I have found out the difference, I *would rather buy from the blender.*" (Rec., p. 191.)

Davis (Commission's witness), questioned as to preference:

"Well, I don't think it would really make any difference with me.

"Q. Is there any difference in the quality of the flour coming from the two concerns?

"A. *I don't know of any.*" (Rec., p. 141.)

What Really Influences Merchants?

Each one of these thirteen witnesses, we may be sure, signed a questionnaire indicating a preference for the products of a grinding mill—but that preference, like so many of the Commission's contentions herein, was merely *theoretical.*

What merchants really prefer is to buy an article which satisfies their customers, and at a price which leaves a profit.

As stated by the Commission's witness *Franklin:*

> "I prefer to buy the flour that comes from the fellow I can buy it cheapest from, that will satisfy the trade." (Rec., Vol. I, p. 213.)

It seems obvious that this must be correct, especially when it is recalled *that consumers in the territory have no preference* at all, as to maker, but buy the particular brands which they like, irrespective of the source of manufacture.

(See original Brief, pp. 14-20, where the evidence is fully reviewed.)

The facts which really control merchants—which seem almost self-evident—were clearly shown by a large number of witnesses coming from various parts of the Southeastern territory, introduced on behalf of respondents.

McBryar, (Rec., pp. 383-384).
Mobley, (Rec., p. 391).
Cook, (Rec., p. 399).
Sherrill, (Rec., p. 405).
Cannon, (Rec., p. 409).
Hughes, (Rec., p. 413).
Lisle, (Rec., p. 422).
Jackson, (Rec., p. 426).
Bryant, (Rec., p. 444).
Rogers, (Rec., p. 448).
Rottero, (Rec., p. 455).
Campion (buyer for Piggly-Wiggly stores, Rec., p. 460).
Coode (former President National Association of Retail Grocers, Rec., p. 465).
Schutt, (Rec., p. 469).
Hall, (Rec., p. 473).
Gupton (former mayor of Nashville, Rec., p. 479).
Schafer ("We are not interested in that as long as the flour stands up and gives the trade satisfaction.") (Rec., p. 483.)
Bannon, (Rec., p. 493).
Murff, (Rec, p. 498).
White, (Rec., pp. 502-503).
Skillern, (Rec., pp. 505-506).
Clayton, (Rec., pp. 512-513).
Whiteside, (does annual business of one and a half to two millions, Rec., p. 516).
Hensley, (Rec., pp. 520-521).
McDonald ("No, there are so many blenders, grinders, that to know the name of the mill you have to know what it is. *There is no longer any distinction*).

"Q. 17. *The word 'milling' has no distinct significance?*

"A. *Has no distinction, no, sir.*" (Rec., p. 529.)

(Witness is manager of chain stores (41) in Chattanooga and neighboring towns, and does annual business of $1,055,000.00.) (Rec., p. 528, p. 529.)

Odom, (Rec., p 574).

Cassels, "Q. 13. Whether he classes himself a manufacturer, a blender or a miller, cuts no figure with you?

"A. *Absolutely none whatever*, if the flour has got the grade, the price is satisfactory, it makes no difference, absolutely." (Rec., p. 579.)

Sloan, (Rec., p. 584).
Lovingwood, (Rec., pp. 585-586).
Walker, (Rec, p. 587).
Bryson, (Rec., p. 592).
Ketner, (Rec., p. 594).
Williams, (Rec., p. 597).
Murphy, (Rec., pp. 607-608).
Bumbus, (Rec., p. 610).
Sneed, (Rec, p. 612).
Vantrease, (Rec., p. 614).
Gower, (Rec., p. 617).
Smotherman, (Rec., p. 619).
Pardue, (Rec, p. 623).
Fehr, (Rec., p. 622).

The fact that the Commission may have been able to find some 10 or 12 merchants out of 225 attempts—most of them from the smallest country towns or villages,—whose testimony may show that *these particular witnesses were "misled,"* and thought the Nashville manufacturers ground wheat, does not support the Commission's claim, against the direct testimony of intelligent and experienced dealers or salesmen (Rec., Vol. I, p. 433, pp. 508-509, p. 301, p. 481, p. 581) thoroughly familiar with the subject, *as to conditions prevailing in this territory.* The question is as to the whole territory—not what a few selected individuals may believe. And business is not transacted on the theoretical preferences of dealers. The factors are price and satisfaction of the customers.

We, therefore, submit that when the whole record is considered, there is no substantial basis for the Commission's conclusions as to diversion of trade by reason of the word "Mills," and that the same are clearly erroneous.

Competitors' Conduct.

Another element overlooked by the Commission is thus stated by the lower Court, viz.: "Upon occasion some of the grinding mills buy surplus flour from other grinding mills, and when this is done the purchasers sell the flour under their own labels." (Rec., Vol. II, p. 190.)

This widespread practice is fully discussed in our original Brief (p. 6, pp. 31-32), and its nature and extent shown.

We think it can hardly be considered "immaterial" (Commission's last Brief, p. 18), nor is it so restricted as opposing counsel suggest.

This, we submit, raises the question of *legitimate* competition.

See,

Federal Trade Commission v. *Raladam Co.*, 283 U. S., at p. 652.
Ohio Leather Co. v. *Federal Trade Commission*, 45 Fed. (2d), at p. 42.
Raladam Co. v. *Federal Trade Commission*, 42 Fed. (2d), at p. 437.

(E)

ASSUMING THE CORRECTNESS OF THE FINDINGS, THE COMMISSION'S ORDER WAS NOT JUSTIFIED.

The orders in these cases direct the respective respondents to

> "cease and desist from carrying on the business of selling flour in commerce among the several States of the United States under a trade name or any other name which includes the words 'Milling Company' or words of like import, and from making representations through advertisements, circulars, correspondence stationery, or in any manner whatsoever, designed to promote or otherwise affect interstate commerce, that they or either of them is a manufacturer of flour, or that

> the flour sold by them or either of them comes direct from manufacturer to purchaser, unless and until respondents, or the individual respondent using such words or making such representations, actually owns and operates or directly and absolutely controls a factory or mill wherein is made by grinding or crushing the wheat berry any and all flour sold or offered for sale by them or either of them under such title or name, or by or through any such representations." (Rec., Vol. I, pp. 34-35.)

If jurisdiction and the Commission's premises should be, for the sake of argument, conceded, we submit that they do not justify such an order.

1. The order ignores the offer of respondents, made early in the proceedings, to use qualifying words, in conspicuous lettering, in connection with bags, containers, letter-heads, etc., which would prevent the possibility of mistake or deception.

Six of the original respondents offered to use the words "NOT GRINDERS OF WHEAT."

The offer made on behalf of respondent Cherokee Mills was not the same, because it was engaged, as part of its business, *in grinding wheat and corn*—though not for human consumption. It, therefore, offered to use the words "PACKED BY CHEROKEE MILLS," with respect to its flour products.

These offers were made by letters to the Commission, and also in the answers to the amended complaints. (Rec., Vol. I, pp. 684-685 p. 20, p. 25, Vol. II, p. 18, p. 56, p. 94, p. 100, p. 134, p. 138, p. 174.)

The Commission acknowledged receipt of the offers and ordered "that said suggested solutions be considered at the time of final argument on the merits."

This was on October 19, 1929 (Rec., Vol. I, p. 22, Vol. II, p. 21, p. 97, p. 136, p. 171), after the Commission's proof as to "deception" had been taken (Rec., Vol. I, p. 294, p. 284).

The offers were made before any proof was taken by respondents, but they were apparently ignored by the Commission. The lower Court commented on this. (Rec., Vol. II, p. 190.)

The Commission seems rather hard put to find a good reason for this. In the lower Court it claimed in its Brief that the qualifying words would but continue the deception, for it would mean to purchasers generally that respondents *"extracted from the wheat the flour which they sell by some other means than grinding the wheat."* The nature of this new process was not explained.

In the present Brief this novel theory is abandoned in favor of the more conservative claim that:

> "In its final decision the Commission was not required to allow respondents to continue their misrepresentations followed by a disavowal." (Last Brief, p. 26.)

We submit that the Commission is without authority for such a claim, and that there is very respectable authority to the contrary.

> *N. Fluegelman & Co.* v. *Fed. Trade Commission* (C. C. A. 2, 1930), 37 Fed (2d), 59, 61.

(Right upheld to use the word "Satin-Maid" as a trade mark on products in fact made from cotton, where there appear in equally conspicuous lettering the words "a cotton fabric," "a cotton satin," "no silk," or equivalent modifying terms.)

> *Federal Trade Commission* v. *Cassoff* (C. C. A. 2, 1930), 38 Fed. (2d), 790, 791.

(Manufacturer labeled his products "White Shellac" and "Orange Shellac," but stated on labels and advertising matter: "This is not 100 per cent India Shellac, it is composed of substitute Shellac and India Shellac.")

> *Federal Trade Commission* v. *Good Grape Co.* (C. C. A. 6, 1930), 45 Fed. (2d), 70, 72.

(Company ordered to desist from use of words "Good Grape" or "Grape," *"unless* in the same connection it is

made prominently to appear *that the product is an imitation artificially colored and flavored.*" (Italics added.)

We submit that these offers were more than fair, and should have been accepted when made, without putting respondents to the heavy expense of bringing witnesses and taking proof; and certainly, that the action, by which the offers were ignored on final hearing, was without legal justification. When the qualifying phrase is used "there can be no deception of the public." (*Fluegelman* case, *supra*, at p. 61.)

2. There is no finding that the making of "self-rising" and "processed" flour by respondents is *not* a manufacturing process, and we submit that plainly it is.

Raw materials are assembled, and by the use of machinery a finished product is created therefrom. (Rec., Vol. I, pp. 42-46, p. 55, pp. 67-70, pp. 72-73, pp. 665-667.)

Nor is it apparent how respondents can fairly be denied the use of the term "manufacturer" with regard to *self-rising* flour, when it is permitted to the grinding mills, who use exactly the same process. (*Ante*, p. 23.)

The order seems beyond the findings, and also inequitable, in this respect.

3. If any of the respondents, in their literature, have claimed that they were wheat grinders—and in only one case can this be charged (*Ante*, p. 22)—then it might be proper to order this particular respondent to desist from these particular representations.

But to take away the trade names of all the respondents, to put them to the heavy expense which the change would require (Rec., Vol. I, p. 76, p. 682), and to destroy the value of long accumulated good will—$7,500.00 was paid for the good will of Royal Milling Company in 1917 (Rec., Vol. I, p. 23)—seems to us both unjust and unnecessary.

It would merely penalize the respondents in favor of competitors who are buying flour from other grinding mills and selling it under their own brands in this very territory

(Rec., Vol. I, pp. 247-249, pp. 571-572, p. 566, pp. 557-558; Original Brief, pp. 6-7), and tend to stifle, rather than promote the existing competition.

We are unable to see how this would benefit the public.

CONCLUSION.

Respondents, therefore, insist:
1. That the Commission was without jurisdiction.
2. That if it had jurisdiction, the cases fail on the merits.
We ask that the decree be affirmed.

Respectfully submitted,

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January, 1933.